

FILED DEC 06 2018

Leah N. Hiles Clerk

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT

BARNSTABLE, ss

CIVIL ACTION: 187204661

JOHN W. SULLIVAN, TIMOTHY C.)
DOYLE, and HERBERT J. SANDBERG,)
Plaintiffs)
)
v.)
)
ROBERT J. POWERS AND VERONICA)
A. POWERS, and ALEX RODOLAKIS,)
JAKE DEWEY, HERBERT)
BORDENSIEK, TODD WALANTIS, and)
MARK HANSEN,)
Defendants)

COMPLAINT
(c. 40A §17)

1. The Plaintiff, John W. Sullivan, is an owner of the property of 700 Poponesset Road, Cotuit, (Barnstable) MA.
2. The Plaintiff, Timothy C. Doyle, is an owner of the property at 741 Poponesset Road, Cotuit, (Barnstable) MA.
3. The Plaintiffs, Herbert J. Sandberg is a resident and beneficial owner of the property at 721 Poponesset Road, Cotuit, (Barnstable) MA.
4. The Defendants, Robert J. Powers and Veronica A. Powers, are the owners of property at 760 Poponesset Road, Cotuit, (Barnstable) MA 02635.
5. The Defendants, Alex Rodolakis, Jake Dewey, Herbert Bordensiek, Todd Walantis and Mark Hansen, are the duly appointed and voting members of the Barnstable Zoning Board of Appeals, which Board has mailing addresses of:

**Alex Rodolakis
1381 Main Street
Osterville, MA 02655**

**Jake Dewey
P.O. Box 614
Hyannisport, MA 02647**

**Herbert Bordensiek
58 Loomes Ln.
Centerville, MA 02632**

**Todd Walantis
P.O. Box 20
Cotuit, MA 02635**

**Mark Hansen
51 Joyce Anne Road
Centerville, MA 02632**

6. On or about June 7, 2018, the Defendants, Powers, filed with the Defendant Board of Appeals an application for a variance from the zoning ordinance of Barnstable, Section 240-14 and 240-36, seeking a variance from the minimum lot size requirements of the ordinance applicable to their property, in order to be allowed to subdivide their property into two (2) undersized lots, for residential development.
7. The Defendant Board caused notice of the Defendants' application and hearing scheduled therein to be posted, advertised and mailed to all parties in interest.
8. The Defendant Board opened and conducted a public hearing on the Defendants said application on July 25, 2018, September 26, 2018, October 10, 2018 and November 14, 2018.

9. At the said public hearings, the Plaintiffs each expressed their opposition to the proposed variance, either in writing, by personal comment, and/or by presentation by their legal counsel.

10. At the conclusion of the public hearing, the Defendant Board voted 4-1 to grant the variance to the Defendants as requested, with conditions.

11. The Board's decision was filed with the Barnstable Town Clerk on November 28, 2018 and an attested copy thereof is attached hereto as Exhibit A.

12. The Plaintiffs allege that they are each parties in interest to this application, being owner and/or residents of residential properties abutting or located directly across the street from the Powers' property, and having received notice of the said hearing from the Board.

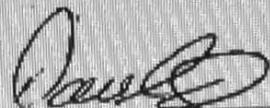
13. The Plaintiffs allege that the Defendant Board exceeded its authority by granting said variance, the Board failed to make findings of fact which support the granting of a variance, and as the facts presented did not warrant the findings necessary to support such a variance, pursuant to G.L. c. 40A §10 or zoning ordinance section 240-125 (B)(1)(c) and/or 240-126.

14. The Plaintiffs allege that they are aggrieved by said decision of the Board, because, *inter alia*, the variance would permit excessive development of the Defendants' property and result in over development of the neighborhood, in direct contravention of the interest and purpose of applicable zoning ordinance and to the detriment of their respective properties.

Wherefore, the Plaintiffs request that this Honorable Court find that the decision of the Defendant Board exceeded its lawful authority, vacate said decision, and enter such other and further relief as may be deemed just and proper.

Respectfully Submitted,
John W. Sullivan,
Timothy C. Doyle,
Herbert J. Sandberg

By Their Attorney,



David S. Reid, Esq., BBO#41540
1292 Route 28
South Yarmouth, MA 02664
508-394-5648
DSReid@Verizon.net

A TRUE COPY ATTEST

Alex M. Powers

Town Clerk
BARNSTABLE
PWS 1-7

Town of Barnstable
Zoning Board of Appeals
Decision and Notice

**BARNSTABLE
TOWN CLERK**

Variance No. 2018-036 – Powers

18 NOV 28 P2:41



Section 240-36 – Resource Protection Overlay District

To allow the division of one parcel into two parcels that will not meet the 2 acre minimum requirement

Summary:	Granted with Conditions
Petitioner:	Robert and Veronica Powers
Property Address:	760 Poponessett Road, Cotuit, MA
Assessor's Map/Parcel:	006/046
Zoning District:	Residence F Zoning District
Hearing Date:	November 14, 2018
Recording Information:	Book: 12635 Page: 278 Plan Book: 19 Page:143

Background

Robert J. and Veronica A. Powers petitioned for a Variance pursuant to Section 240-36 Resource Protection Overlay District (RPOD) and Section 240-14 Residence F (RF) Zoning District. The petitioners sought relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2. The proposed Lot 1 will have approximately 45,230 square feet of upland and the proposed Lot 2 will have approximately 43,600 square feet of upland where 2 acres is required. The subject property is located at 760 Poponessett Road, Cotuit, MA as shown on Assessor's Map 006 Parcel 046. It is located in the Residence F (RF) Zoning District and the Resource Protection Overlay District (RPOD).

In 2001, the Planning Board approved a plan for the combination of what were then three lots, held in common ownership, re-divided into two lots. Subsequently, the engineering company failed to record the Definitive Plan within the statutory requirement and the Definitive Plan became invalid and not in conformance to the current RF/RPOD Zoning District.

The subject property is a 2.80 acre, rectangular shaped lot with frontage on Poponessett Road in Cotuit. It is located in the single-family residential area with generally one acre lots, Fullers Marsh to the south and east, and Santuit Road to the north. Poponessett Road is unimproved at this location. The subject property is improved with a 6,084 gross square foot (2,942 square foot living area), three-bedroom, single-family dwelling, constructed in 2001. It is a two and half story Colonial style dwelling with an attached two car garage. The dwelling is on a septic system and is presumed to be connected to town water.

Proposal & Hearing Summary

Variance No. 2018-036 for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Poponessett Road, Cotuit, MA was filed at the Town Clerks office and the office of the Zoning Board of Appeals on June 7, 2018. A Public Hearing before the Zoning Board of Appeals was duly advertised and notice sent to all abutters and interested parties in accordance with M.G.L. Chapter 40A. The hearing was opened on July 25, 2018 and continued to September 26, 2018, October 10, 2018 and to November 14, 2018 at which time the Board found to grant the variance subject to conditions. Board members deciding this appeal were: Alex Rodolakis, Herbert Bodensiek, Jake Dewey, Todd Walantis and Mark Hansen.

Mr. and Mrs. Powers represented themselves before the Board with assistance from Ariene Wilson, from A.M. Wilson and Associates. Also present was Richard L'Heureux from CapeSurv.

**Town of Barnstable Planning and Development Department Decision
Variance 2018-036 – Powers**

At the July 25, 2018, the applicants reviewed the permitting history of the lot(s) and the reason they are seeking a variance now. Mr. Powers argued that one acre of upland fits into the neighborhood and the wetlands bisecting the property make this a unique situation. He stated it is impossible to use this as one lot. Mr. Powers stated the hardship is financial and he and his wife need to be in a one-level dwelling for health and safety reasons. Ms. Wilson stated that the nitrogen loading could be much worse if a property owner constructs a 12 bedroom dwelling on the lot instead of the proposed 2-bedroom dwelling. Mr. Powers stated the engineering company failed to record the approved Planning Board plan within the statutory time required. He did state that after a legal battle, he was compensated for the engineering firm's failure to act. At the September 26, 2018 Hearing, the Applicants requested a continuance. At the October 10, 2018 hearing, letters from the public were discussed and the Board discussed possible construction restrictions on the vacant lot. The Board requested the Applicants and Staff draft conditions to restrict development.

At the November 14, 2018 hearing, the Board Chair reviewed the drafted conditions.

The Board Chair requested public comment. Attorney David Reid, representing the Sullivan Family, spoke in opposition of the variance. He submitted documents and reviewed them for the Board. He pointed out that the applicants had not received approval from the Planning Board in 1999. He stated that lot size is not a basis for a variance and questioned the hardship. Attorney Reid pointed out that the applicants were compensated for the failure to act. He stated this variance is not a benefit to the neighborhood and the abutters do not want the road upgraded. He concluded that this petition does not meet the criteria for a variance.

Arlene Wilson, environmental specialist, explained the reason for the RPOD and that this land is burdened by a wetland in the middle of the lot. She stated conditions affecting this drainage easement are unique to this lot. She stated the hardship is that the applicants cannot construct an addition to their existing dwelling due to setback to wetlands requirements. Ms. Wilson stated that the Ordinance allows for a 12-bedroom dwelling to be constructed on site along with accessory structures. The potential development could be double the nitrogen loading.

Pam Howell spoke of concerns over changes to the natural setting. She believes the current dwelling could be modified to meet the applicant's needs.

The Board received letters of support from William Miller, Robert Pontifex, Robert Benedetto, Christopher Dooley, Dianne and Larry Rhude, Mary and John Donovan, Alicia and Stephen Furrer.

The Board received letters of opposition from Pam and Mark Howell, Herbert and Harriet Sandberg, Margaret Bernard, Joe Sullivan, and Timothy Doyle.

Findings of Fact

At the hearing on November 14, 2018, the Board voted and made the following findings of fact in Variance No. 2018-036, relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Poponessett Road, Cotuit:

1. Owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located. The Board found the lot to be unique due to the existence of the drainage easement which bisects the buildable area of the lot.
2. A literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner. The Board found there to be economic hardship should there be a literal enforcement of the Ordinance.

**Town of Barnstable Planning and Development Department Decision
Variance 2018-036 – Powers**

- Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance. The Board found that by limiting the size of the dwellings and further structures both on proposed Lot 1 and Lot 2 would not be substantially detrimental to the neighborhood especially given the size of an as of right structure and additional structures that would otherwise be permissible on the existing lot.

The vote to accept the findings was:

AYE: Alex Rodolakis, Jake Dewey, Todd Walantis and Mark Hansen

NAY: Herbert Bodensiek found the petition does not meet the criteria for a variance

Decision

Appeal No. 2018-036, a request for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 760 Poponessett Road, Cotuit, has been granted subject to the following conditions:

Lot 1 (vacant lot)

- Minimum northerly side yard setback shall be 50 feet and will be planted and maintained with native vegetation.
- No more than two bedroom dwelling shall be constructed.
- Maximum height of the dwelling shall be 1 ½ stories.
- Vegetated area shall be free of fertilizer, herbicides, and pesticides.
- The garage shall be no larger than to accommodate 2 cars.
- The maximum building footprint shall be 2,500 square feet including the garage.
- There shall be no exterior construction before 8:00 a.m. or after 5:00 p.m. except in case of an emergency. There shall be no construction on Sunday or holidays except for emergencies.
- There shall be no short term rentals of less than six months.

Lot 2 (house lot)

- The current development on this lot shall represent full buildout. Further expansion of the dwelling or construction of additional accessory structures is prohibited without prior approval from the Board.

General

- Variance No. 2018-036 is granted to Robert J. and Veronica A. Powers, to allow the division of one parcel into two separate nonconforming parcels at 760 Poponessett Road, Cotuit MA.

**Town of Barnstable Planning and Development Department Decision
Variance 2018-036 – Powers**

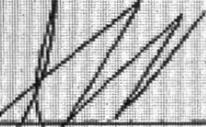
11. The division of land shall be in substantial conformance with the plan entitled "Plan of Land at 780 Poponessett Road, Barnstable (Cotuit), Mass" prepared for Robert J & Veronica Powers dated May 29, 2018 drawn by CapeSurv.
12. No further division of land shall be permitted without approval from the Board.
13. This decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to issuance of a building permit. The rights authorized by this variance must be exercised within one year, unless extended.

AYE: Alex Rodolakis, Jake Dewey, Todd Walantis and Mark Hansen

NAY: Herbert Bodensiek found the petition does not meet the criteria for a variance

Ordered

Variance No. 2018-036 for relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2 at 780 Poponessett Road, Cotuit has been granted with conditions. This decision must be recorded at the Barnstable Registry of Deeds for it to be in effect and notice of that recording submitted to the Zoning Board of Appeals Office. The relief authorized by this decision must be exercised within one year unless extended. Appeals of this decision, if any, shall be made pursuant to MGL Chapter 40A, Section 17, within twenty days after the date of the filing of this decision, a copy of which must be filed in the office of the Barnstable Town Clerk.


Alex Rodolakis, Chair

March 28, 2018

Date Signed

I, Ann Quirk, Clerk of the Town of Barnstable, Barnstable County, Massachusetts, hereby certify that twenty (20) days have elapsed since the Zoning Board of Appeals filed this decision and that no appeal of the decision has been filed in the office of the Town Clerk.

Signed and sealed this _____ day of _____ under the pains and penalties of perjury.

Ann Quirk, Town Clerk

Zoning Board of Appeals (ZBA) Abutter List for Map & Parcel(s): '006046'

Parties of interest are those directly opposite subject lot on any public or private street or way and abutters to abutters. Notification of all properties within 300 feet ring of the subject lot.

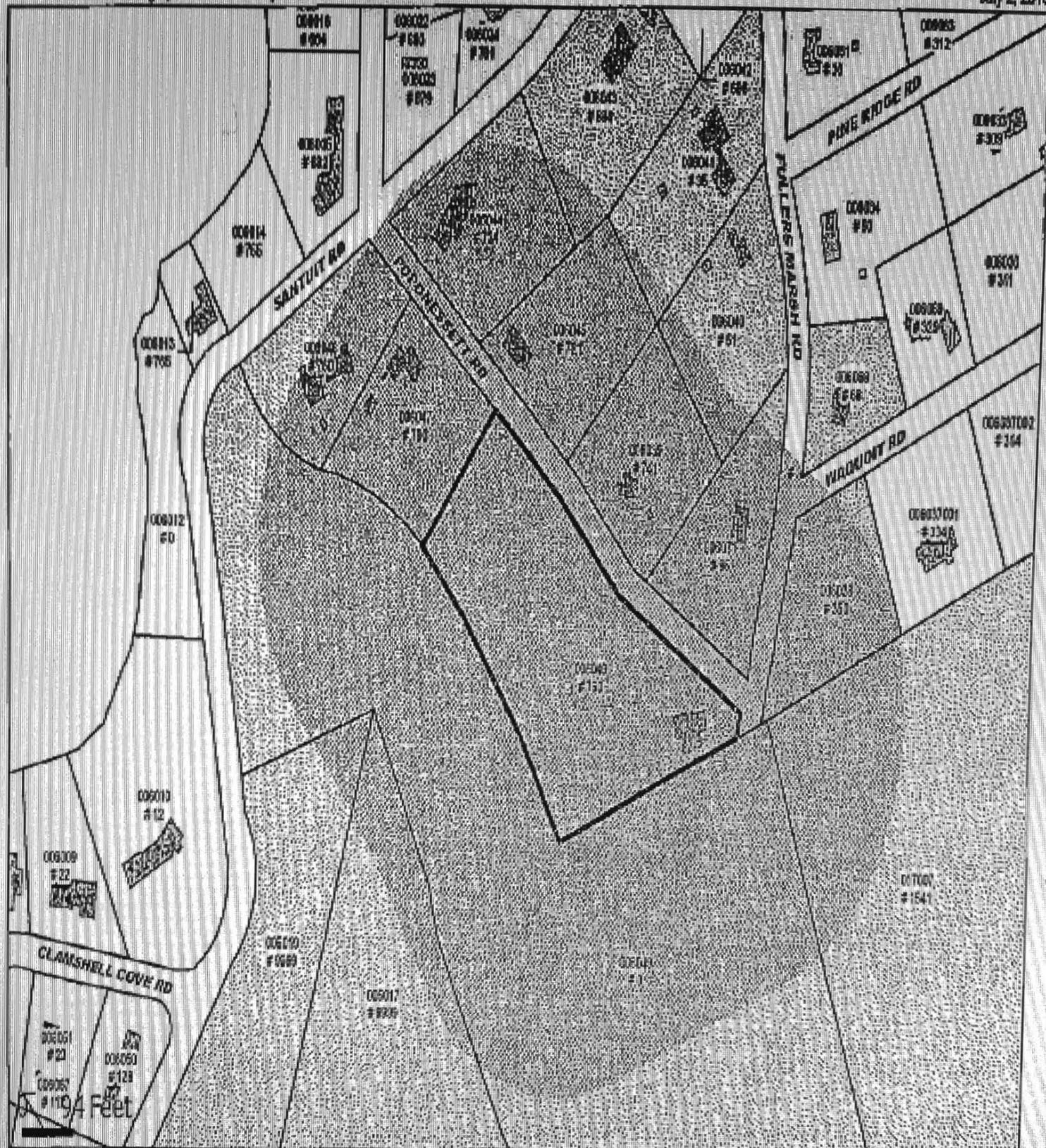
Total Count: 16



Close

Map & Parcel	Owner1	Owner2	Address1	Address 2	Mailing City/State/Zip	Country	Deed
005017	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601		HOME
005019	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601		6685/179
006038	WALSH, WILLIAM & ANN		8 JANICE RD		CANTON, MA 02021		20801/311
006039	DOYLE, TIMOTHY C & KATHLEEN H		PO BOX 6046		LAWRENCEVILLE, NJ 08648		6647/94
006040	DOOLEY, CHRISTOPHER G		3 WIGHT LANE		WESTWOOD, MA 02090		25971/188
006041	FORBUSH, JAMES & KRISTEN		16 LITTLE POND ROAD		NORTHBOROUGH, MA 01532		28418/49
006043	FURRER, ALICIA NYE CROWELL & STEPHEN A		694 SANTUIT RD		COTUIT, MA 02635		14911/177
006044	CAPOZZI, VINCENT & KAREN TRS	724 SANTUIT ROAD COTUIT REALTY TRUST	8 ZITO DRIVE		SAUGUS, MA 01906-3234		30430/86
006045	SUHRE, LAUREN S & GUNTHER, DAVID H TRS		250 HAMMOND POND RIVRY		CHESTNUT HILL, MA 02467		29835/57
006046	POWERS, ROBERT J & VERONICA A		760 POPOQUESSETT RD		COTUIT, MA 02635		12635/270
006047	SULLIVAN, DANIEL P		700 POPOQUESSETT ROAD		COTUIT, MA 02635		28787/58
006048	BACON, JOHN C & RAMUTA H		750 SANTUIT RD		COTUIT, MA 02635		4049/315
006049	BARNSTABLE, TOWN OF (CON)	CONSERVATION COMMISSION	200 MAIN STREET		HYANNIS, MA 02601		1415/72
006060	KORNIGSBERG, JEDDEAH & FERGUSON, CHRISTI		47 MILFORD ST # 1		BOSTON, MA 02118		30583/174
006071	SIMPSON, CRAIG		425 GALLIVAN BLVD		DORCHESTER, CTR, MA 02124-5230		8252/6
017007	NEW RUSHY MARSH REALTY LLC		1500 MAIN STREET		COTUIT, MA 02635		01312862

This list by itself does NOT constitute a certified list of abutters and is provided only as an aid to the determination of abutters. If a certified list of abutters is required, contact the Assessing Division to have this list certified. The owner and address data on this list is from the Town of Barnstable Assessor's database as of 7/2/2018.



DISCLAIMER: This map is for planning purposes only. It is not adequate for legal, surveying, title, or regulatory interpretation. It is general in scale at 1:10,000 and may not meet established map surveying standards. The parcel lines on this map are only graphic representations of Assessor's tax parcels. They are not true property boundaries and do not represent accurate relationships to physical features on the map such as building locations.

Map 006 Project 046 Zoning Board of Appeals (ZBA)

Abutter List Type - Parties of interest are those directly opposite subject lot on any public or private street or way and abutters to abutters. Notification of all properties within 200 foot ring of the subject lot.

Selected Parcel

Abutters

Suffer



**Town of Barnstable
Planning and Development
Zoning Board of Appeals
Notice of Public Hearings under the Zoning Ordinance
July 25, 2018**

To all persons interested or affected by the actions of the Zoning Board of Appeals, you are hereby invited, pursuant to Section 11 of Chapter 40B of the General Laws of the Commonwealth of Massachusetts, and all subsequent thereto, that a public hearing on the following subject will be held on Wednesday, July 25, 2018 at the time indicated:

7:00 PM - Appeal No. 2018-038, **Planning**
Robert J. and Veronica A. Powers have petitioned for a Variance pursuant to Section 340-35 Resource Protection Overlay District (RPOD) and Section 340-14 Residential Overlay District (ROD) Zoning District. The petitioners are seeking relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2. The proposed Lot 1 will have approximately 43,200 square feet of upland and the proposed Lot 2 will have approximately 43,000 square feet of upland when 2 acres is required. The subject property is located at 780 Popponesset Road, Chilmark, MA as shown on Assessor's Map 004 Parcel 048. It is located in the Residential F (RF) Zoning District and the Resource Protection Overlay District (RPOD).

These public hearings will be held at the Barnstable Town Hall, 357 Main Street, Hyannis, MA, Hearing Room located on the 2nd Floor Wednesday, July 25, 2018. Plans and applications may be reviewed at the Zoning Board of Appeals Office, Planning and Development Department, Town Offices, 200 Main Street, Hyannis, MA.

Barnstable Parish
July 5, 2018 and July 13, 2018

Alex Rodriguez, Chair
Zoning Board of Appeals

**Town of Barnstable
Planning and Development
Zoning Board of Appeals
Notice of Public Hearings under the Zoning Ordinance
July 25, 2018**

To all persons interested or affected by the actions of the Zoning Board of Appeals, you are hereby invited, pursuant to Section 11 of Chapter 40B of the General Laws of the Commonwealth of Massachusetts, and all subsequent thereto, that a public hearing on the following subject will be held on Wednesday, July 25, 2018 at the time indicated:

7:00 PM - Appeal No. 2018-038, **Planning**
Robert J. and Veronica A. Powers have petitioned for a Variance pursuant to Section 340-35 Resource Protection Overlay District (RPOD) and Section 340-14 Residential F (RF) Zoning District. The petitioners are seeking relief from the minimum lot size requirement to divide their lot into Lot 1 and Lot 2. The proposed Lot 1 will have approximately 43,200 square feet of upland and the proposed Lot 2 will have approximately 43,000 square feet of upland when 2 acres is required. The subject property is located at 780 Popponesset Road, Chilmark, MA as shown on Assessor's Map 004 Parcel 048. It is located in the Residential F (RF) Zoning District and the Resource Protection Overlay District (RPOD).

These public hearings will be held at the Barnstable Town Hall, 357 Main Street, Hyannis, MA, Hearing Room located on the 2nd Floor Wednesday, July 25, 2018. Plans and applications may be reviewed at the Zoning Board of Appeals Office, Planning and Development Department, Town Offices, 200 Main Street, Hyannis, MA.

Barnstable Parish
July 5, 2018 and July 13, 2018

Alex Rodriguez, Chair
Zoning Board of Appeals

This document is in PDF/A standard and has been opened read-only to prevent modification.

CIVIL ACTION COVER SHEET		TRIAL COURT OF MASSACHUSETTS SUPERIOR COURT DEPARTMENT	DOCKET NO. <u>1872CV661</u>
COUNTY OF PLAINTIFF(S) <u>John W. Sullivan, Timothy C. Doyle, Herbert J. Sandberg</u>		BARNSTABLE	DEFENDANT(S) <u>Robert J. Powers, Veronica A. Powers, Alex Rodolakis, Jake Dewey, Herbert Bordensiek, Todd Walantis, Mark Hansen</u>
Type Plaintiff's Attorney name, Address, City/State/Zip Phone Number and BBO#		Type Defendant's Attorney Name, Address, City/State/Zip Phone Number (if known)	
David S. Reid, Esq. 1292 Route 28 South Yarmouth MA 02684 508-394-5648 BBO 415540		SUPERIOR COURT BARNSTABLE, SS FILED <u>DEC 05 2018</u>	

TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)		
CODE NO.	TYPE OF ACTION (specify)	TRACK
C02 Zoning Appeal G L c 40A - Fast Track		IS THIS A JURY CASE? <input type="checkbox"/> 1 Yes <input checked="" type="checkbox"/> 1 No

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS (Attach additional sheets as necessary)	
A. Documented medical expenses to date:	\$
1. Total hospital expenses	\$
2. Total doctor expenses	\$
3. Total chiropractic expenses	\$
4. Total physical therapy expenses	\$
5. Total other expenses (describe)	\$
Subtotal \$	
B. Documented lost wages and compensation to date	\$
C. Documented property damages to date	\$
D. Reasonably anticipated future medical expenses	\$
E. Reasonably anticipated lost wages and compensation to date	\$
F. Other documented items of damages (describe)	\$
G. Brief description of plaintiff's injury, including nature and extent of injury (describe)	
Total \$	

CONTRACT CLAIMS (Attach additional sheets as necessary)	
Provide a detailed description of claim(s):	
TOTAL \$.....	

PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT

*I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods.

Signature of Attorney of Record Walter C. Date: 10/11/18
A.O.S.C. 3-2007